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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

MARK HUTNYAN,

Plaintiff,

v.

DIANE CAFFERATA HUTNYAN;  
 KRISTIAN HERZOG Also Known As  
 KRIS HERZOG, Individually and  
 Doing Business As THE BODYGUARD  
 GROUP OF BEVERLY HILLS;  
 COUNTY OF LOS ANGELES;  
 RICKY TYSON; EDDIE CARTER;  
 GLENN VALVERDE;  
 NICHOLAS JOHNSTON;  
 GERMAINE MOORE;  
 CITY OF MANHATTAN BEACH;  
 RYAN SMALL; CHAD SWANSON;  
 CHRIS NGUYEN; TERESA MANQUEROS;  
 and DOES 1 to 10, Inclusive,

Defendants.

Case No.: 2:17-cv-00545-PSG-ASx

**PLAINTIFF'S OPPOSITION TO  
 DEFENDANT DIANE CAFFERATA'S  
 SPECIAL MOTION TO STRIKE  
 PURSUANT TO CALIFORNIA CODE OF  
 CIVIL PROCEDURE § 425.16;  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES**

Date: July 10, 2017

Time: 1:30 p.m.

Courtroom: 6A

Judge: Hon. Philip S. Gutierrez

[Request for Judicial Notice Filed  
 Concurrently]

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1 **TO ALL INTERESTED PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 COMES NOW plaintiff Mark Hutnyan ("Hutnyan"), who hereby submits the following  
3 opposition to defendant Diane Cafferata's ("Cafferata")<sup>1</sup> notice of motion and special motion to  
4 strike pursuant to California Code of Civil Procedure § 425.16 as follows:

5  
6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. SUMMARY OF ARGUMENT**

8 Cafferata seeks to turn the anti-SLAPP law on its head. Contrary to the position taken in  
9 the motion, Cafferata was not contacting the authorities to seek help, but to allow her and her  
10 co-conspirators to engage in the wrongful conduct alleged in the complaint.

11  
12 Based on the preposterous fallacy that Cafferata was entitled to enter what had been  
13 previously the family home ("the home") solely occupied by Hutnyan under any circumstances  
14 because of their Marital Settlement Agreement ("MSA"), Cafferata attempts to defend her  
15 wrongful conduct, asserting that she merely sought to "safely transition back into the home."  
16 (Motion, p. 1, line 10.)

17  
18 In fact, the MSA specifically provides that Respondent (Hutnyan) will provide  
19 "Petitioner [Cafferata] with access to the marital residence **upon reasonable notice** from  
20 Petitioner [Cafferata]. (See MSA, p.11; emphasis added.) The conduct alleged in the complaint  
21 hardly constitutes "reasonable notice". Rather, it constitutes extremely reckless and illegal  
22 conduct by all defendants who conspired to engage in the wrongful acts with Cafferata. In fact,  
23 the conduct by Cafferata and her co-defendants, as alleged in the complaint, ultimately resulted  
24 in a CLETS Order against her (See Plaintiff's Request for Judicial Notice, Exhibit "2").

25  
26  
27  
28 <sup>1</sup> Honorifics will not be used. No disrespect is intended.

1           The reality is that under the guise of a claim of right to possession under the MSA (See  
 2 Defendant's Request for Judicial Notice), instead of simply contacting Hutnyan and requesting  
 3 a mutually convenient date and time to come to the home that is the subject of the MSA,  
 4 Cafferata, along with the co-defendants, consisting primarily of L.A. County Sheriff  
 5 Department personnel who were armed, dressed in tactical gear, and wearing body cameras,  
 6 illegally broke into and entered the home under cover of night at 10:30 p.m., while the home  
 7 was legally occupied by Hutnyan in violation of his civil rights and causing the injuries and  
 8 damages alleged in the complaint.  
 9

10           Plaintiff's claim is not based on an action involving any protected activity. The principal  
 11 thrust or gravamen of plaintiff's action is defendants' wrongful, unlawful and reprehensible  
 12 breaking and entering into the home rightfully occupied by plaintiff. Plaintiff's claims are not  
 13 based on any action involving public participation and petition. Cafferata's claims are not based  
 14 solely on her communication with law enforcement. The conduct in the complaint describes  
 15 unprotected activity. The First Amendment does not protect the outrageous conduct of Cafferata  
 16 and her co-conspirators, who, as alleged in the complaint, broke into the home rightfully  
 17 occupied by plaintiff, under cover of night, with off-duty police officers, carrying weapons,  
 18 wearing tactical gear and body cameras, all conspiring to violate plaintiff's civil rights by  
 19 engaging in an unreasonable search and seizure and depriving him of his personal liberty and  
 20 property.  
 21  
 22

23           As to the individual paragraphs that Cafferata claims fall within the scope of the anti-  
 24 SLAPP statute (§§ 34-37), the court should never reach this analysis as it must first make a  
 25 determination that the complaint alleges protected activity. "Unlawful or criminal activities do  
 26 not qualify as protected speech or petition activities under the anti-SLAPP statute. (*Flatley v.*  
 27  
 28

1 *Mauro* (2006) 39 Cal.4<sup>th</sup> 299, 317.) Here, we are not dealing with a “false police report,” but  
 2 false statements to the police, which were used by Cafferata to engage in her illegal activity.

3 Additionally, as set forth below, Cafferata’s conduct is not privileged because the  
 4 communications alleged were not made in any judicial or quasi-judicial proceedings, by a  
 5 litigant or other participant authorized by law, to achieve the objects of litigation that has some  
 6 connection or logical relation to the action.  
 7

## 8 9 **II. STATEMENT OF FACTS**

10 The following facts relevant to defendant’s motion are alleged in plaintiff’s complaint:

11 The following facts relevant to defendant’s motion are alleged in plaintiff’s complaint:

- 12 • On March 25 and March 26, 2016, at Plaintiff’s residence in Manhattan Beach (the  
 13 “home”), Defendants, and each of them, unlawfully and forcefully entered the home  
 14 without knocking, warning, notice, all in violation of Plaintiff’s civil rights under  
 15 Fourth and Fourteenth Amendments of the United States Constitution and statutory  
 16 law (Complaint, ¶ 26.)
- 17 • On or about March 3, 2015 DIANE CAFFERATA HUTNYAN (“MRS.  
 18 HUTNYAN”) and Plaintiff entered into a Marital Settlement Agreement (“MSA”),  
 19 wherein Plaintiff was awarded temporary sole possession of the home. Consistent  
 20 with this Agreement MS. HUTNYAN vacated the home. (*Id.* at ¶ 29.)
- 21 • While Plaintiff still maintained sole possession of the home, pursuant to the MSA,  
 22 MRS. HUTNYAN retained the services of Defendants HERZOG, a retired police  
 23 officer, and THE BODYGUARD GROUP, to enter the home with MRS. HUTNYAN  
 24 armed with weapons to harass, threaten and intimidate Plaintiff. (*Id.*, ¶ 30.)  
 25  
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- 1 • HERZOG employs law enforcement officers, including Los Angeles County Sheriff's  
2 Deputies and other employees and agents of the County of Los Angeles, including  
3 named Defendants TYSON, CARTER, VALVERDE, JOHNSTON, MOORE  
4 (collectively "COUNTY EMPLOYEES"); and these named Defendants were so  
5 employed for this so-called assignment on behalf of MRS. HUTNYAN. (*Id.* at ¶ 31.)  
6
- 7 • Defendant COUNTY OF LOS ANGELES knew or should have known that its  
8 officers, including the Defendant COUNTY EMPLOYEES routinely worked and  
9 continue to work off-duty in so-called security positions including their work with  
10 Defendant HERZOG and THE BODYGUARD GROUP. (*Id.* at ¶ 32.)  
11
- 12 • On or about March 23, 2016, the Defendants notified the CITY OF MANHATTAN  
13 BEACH, through the Manhattan Beach Police Department in writing by email that  
14 Defendants HERZOG and the COUNTY EMPLOYEES intended to enter the home  
15 with MRS. HUTNYAN armed with weapons and wearing body cameras. (*Id.* at ¶  
16 34.)  
17
- 18 • On the same date, Defendants HERZOG and/or the COUNTY EMPLOYEES advised  
19 the CITY OF MANHATTAN BEACH through the Manhattan Beach Police  
20 Department in writing by email that Plaintiff would make a "fake" 911 call to  
21 Defendant Manhattan Beach Police Department when Defendants HERZOG, the  
22 COUNTY EMPLOYEES and MRS. HUTNYAN entered the home. (*Id.* at ¶ 35.)  
23
- 24 • On the same date, Defendants HERZOG and/or COUNTY EMPLOYEES advised the  
25 CITY OF MANHATTAN BEACH by a telephone call with Defendant RYAN  
26 SMALL, Lieutenant with the Manhattan Beach Police Department, that HERZOG  
27  
28



1 and the COUNTY EMPLOYEES, along with MRS. HUTNYAN intended to enter the  
2 home armed with weapons and wearing body cameras. (*Id.* at ¶ 36.)

- 3 • On March 25, 2016, HERZOG and/or the COUNTY EMPLOYEES called dispatch  
4 of the Manhattan Beach Police Department to inform them that they were either near  
5 to, or were already at the home with Defendant MRS. HUTNYAN, they were armed,  
6 and they were going to enter the home, by force if necessary, because Plaintiff was  
7 “squatting in the house”, that MRS. HUTNYAN was the “owner” of the home, and  
8 Plaintiff was “inebriated most of the time.” During this conversation Defendants  
9 HERZOG and/or COUNTY EMPLOYEES referred to Plaintiff as “the suspect”, and  
10 referred to MRS. HUTNYAN as “the victim.” (*Id.* at ¶ 37.)

- 11 • On March 25, 2016, between 10:00 and 10:30 p.m., Defendants HERZOG, the five-  
12 armed COUNTY EMPLOYEES clad in tactical uniform gear and wearing body  
13 cameras, along with MRS. HUTNYAN unlawfully entered into the home by force,  
14 using the services of a locksmith who used a drill or other equipment to force the lock  
15 on the front door of the home and break-in the home to gain access, and did thus  
16 unlawfully invade and search the home. Plaintiff was inside the home alone at that  
17 time. Plaintiff was struck on his arm and upon his body during this unlawful break-in  
18 and invasion into the home. Plaintiff did not consent to this invasion into the home.  
19 (*Id.* at ¶ 38.)

- 20 • During this invasion, Plaintiff was harassed, threatened, intimidated and was told by  
21 the Defendants including the COUNTY EMPLOYEES and MRS. HUTNYAN that if  
22 he refused to provide them with keys to the home, the hired locksmith would forcibly  
23 open all of the other locks to the home. (*Id.* at ¶ 39.)

- 1 • During this home invasion, all of the Defendants, including the COUNTY  
2 EMPLOYEES and MRS. HUTNYAN continually harassed, threatened and  
3 intimidated Plaintiff by engaging in various forms of improper conduct and telling  
4 him he had to move his cars from the garage. (*Id.* at ¶¶ 40-41.)
- 5 • During the home invasion, Plaintiff called 911 and explained in detail to the CITY  
6 OF MANHATTAN BEACH through dispatch of the Manhattan Beach Police  
7 Department what was happening to him and that he had retreated in fear to his  
8 bedroom. (*Id.* at ¶ 42.)
- 9 • During the invasion, Defendants SWANSON, NGUYEN and MANQUEROS  
10 (“CITY EMPLOYEES”), police officers employed by Defendant CITY OF  
11 MANHATTAN BEACH through the Manhattan Beach Police Department, arrived at  
12 the home, but rather than impartially investigate the incident, the CITY  
13 EMPLOYEES failed to follow proper City of Manhattan Beach Police Department  
14 procedures in the investigation before, during and after this home invasion occurred.  
15 (*Id.* at ¶ 43.)
- 16 • Defendant CITY OF MANHATTAN BEACH and the CITY EMPLOYEES through  
17 the Manhattan Beach Police Department failed to take any measures to investigate,  
18 inquire, access, act upon, intervene or determine the legality or illegality of the home  
19 invasion suffered by Plaintiff and failed to follow proper police procedures. (*Id.* at ¶  
20 44.)
- 21 • Due to the harassment, threats and intimidation by all the Defendants, Plaintiff was  
22 forced to, and did in fact leave his home that evening out of fear, worry and anxiety,  
23 and temporarily resided at a hotel. (*Id.* at ¶ 45.)
- 24
- 25
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- 1 • In essence, because of the standing of the police officers, Defendants ignored the  
2 explanation provided by Plaintiff and instead, chose to and did act illegally. The  
3 actions and inactions by Defendants shocked the conscience and demonstrated  
4 deliberate indifference and conscious disregard for Plaintiff's life, liberty, well-being  
5 and were all in violation of his civil rights. (*Id.* at ¶ 46.)
- 6 • Due to the actions and inactions by each of the Defendants, Plaintiff suffered injuries  
7 and damages. (*Id.* at ¶ 47.)
- 8 • Defendant COUNTY OF LOS ANGELES through the Los Angeles County Sheriff's  
9 Department caused Plaintiff's injuries and damages through their policies, practices,  
10 customs and/or usages that ratify the abuse and misuse of police power and the use of  
11 unnecessary and unreasonable means by Defendants COUNTY EMPLOYEES and  
12 CITY EMPLOYEES. (*Id.* at ¶ 48.)
- 13 • Each of the Defendants conspired and acted in concert with each of the other  
14 Defendants and under color of the authority and pretense of the statutes, ordinances,  
15 regulations, customs, or usages, of Defendants COUNTY OF LOS ANGELES and  
16 CITY OF MANHATTAN BEACH in authorizing, directing, and/or causing Plaintiff  
17 to suffer excessive force in the entering of the home, conducting an unlawful search  
18 of the home and Plaintiff's personal property, committing unlawful harassment,  
19 threats, course of conduct and intimidation, which was unreasonable and done  
20 intentionally, without lawful justification or reason, and was designed to and did  
21 cause injury to Plaintiff's rights as guaranteed under 42 U.S.C. § 1983, and the Fourth  
22 and Fourteenth Amendments to the United States Constitution, including the right to  
23 be free from an unreasonable search of the home, and of Plaintiff's papers and effects,  
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1 and the right to be free from use of excessive, unreasonable and unjustified force, and  
 2 the right to be free from the use of unlawful harassment, threats, course of conduct  
 3 and intimidation. (*Id.* at ¶ 53.)

- 4 • As a proximate result of the conduct of Defendants, Plaintiff suffered serious injuries  
 5 to his health, strength, including injuries to his body, his nervous system and  
 6 emotional injuries causing him to incur general and special damages. (*Id.* at ¶ 54.)
- 7 • Defendant COUNTY OF LOS ANGELES maintains policies, practices, customs, and  
 8 usages, that condoned, tolerated, and allowed its officers, including Defendants  
 9 COUNTY EMPLOYEES to commit and execute the unconstitutional use of  
 10 unnecessary, unreasonable and/or excessive force, unlawful searches and seizures,  
 11 unlawful harassment, threats, coercion and intimidation; the culture and promotion of  
 12 Defendant COUNTY EMPLOYEES' unconstitutional use of unnecessary,  
 13 unreasonable and/or excessive force, unlawful searches and seizures, and unlawful  
 14 harassment, threats, coercion and intimidation to achieve personal goals and ends;  
 15 and Defendant COUNTY EMPLOYEES' use of police power for personal reasons  
 16 and goals. (*Id.* at ¶ 59.)
- 17 • Defendant COUNTY OF LOS ANGELES through their supervisory employees and  
 18 agents have and continue to have a mandatory duty of care to properly and adequately  
 19 hire, train, retrain, supervise and discipline its officers, including Defendant's  
 20 COUNTY EMPLOYEES, so as to avoid unreasonable risk of harm to its citizens  
 21 including the deprivation of civil rights. (*Id.* at ¶ 60.)
- 22 • Defendant COUNTY OF LOS ANGELES had either actual or constructive  
 23 knowledge of their deficient policies, practices, customs and usages, particularly  
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1 when its officers work off-duty in various security positions. As a result of this  
 2 failure, Defendant COUNTY OF LOS ANGELES ratified its officers' disregard of  
 3 constitutional and statutory rights as alleged herein. (*Id.* at ¶ 61.)

- 4 • The conduct of each of the Defendants was extreme and outrageous with the intention  
 5 of causing, or the reckless disregard of the probability of causing emotional distress,  
 6 and as an approximate result of Defendant's conduct, Plaintiff suffered severe  
 7 emotional distress. (*Id.* at ¶ 66-67.)
- 8 • Plaintiff believed that he would be struck about his body and in fact was struck upon  
 9 by his body by Defendants during the invasion of his home on March 25, 2016. (*Id.*  
 10 at ¶ 71.)
- 11 • Each of the Defendants acted as the agents, servants, employees, employers,  
 12 principals, and/or representatives of each of the remaining Defendants, and each of  
 13 them, were acting within the course and scope of this agency, service and  
 14 employment. (*Id.* at ¶ 22.)
- 15 • Each wrongful act alleged in the Complaint was done with the express or implied  
 16 approval, knowledge and consent, either actual or constructive of all other Defendants  
 17 and each Defendant ratified and approved the acts and omissions of each of the other  
 18 Defendants. (*Id.* at ¶ 23.)
- 19 • Each of the Defendants acted in concert in furtherance of each other's interests. (*Id.*  
 20 at ¶ 24.)

21 ///

22 ///

23 ///

### 1 **III. ARGUMENT.**

#### 2 **A. Cafferata's Motion Does Not Survive The Court's Two-Step Analysis.**

3 In a motion to strike under Code of Civil Procedure § 425.16, the court engages in a two-  
4 part analysis: (1) the court decides whether defendant has made a threshold showing that the  
5 challenged cause of action arises from a protected activity; and (2) if such a showing has been  
6 made, the burden shifts to plaintiff to demonstrate a probability of prevailing on the merits of his  
7 or her claims. (*Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4<sup>th</sup> 53.) The  
8 purpose of this statute is to respond to lawsuits that chill citizens from exercising their political  
9 rights to free speech and activities.  
10

11 “The critical point is whether the plaintiff's cause of action itself was based on an act in  
12 furtherance of the defendant's right of petition or free speech.” (*Scott v. Metabolife Intern., Inc.*  
13 (2004) 115 Cal.App.4<sup>th</sup> 404, 414.) Whether the anti-SLAPP statute applies is determined by the  
14 “principal thrust” or “gravamen” of the claim and therefore the statute cannot be invoked for  
15 allegations of protected activity that are only incidental to a cause of action based on unprotected  
16 activity. (*Martinez v. Metabolife Int'l, Inc.* (2003) 113 Cal.App.4<sup>th</sup> 181, 185.)  
17

#### 18 **1. Step One: Plaintiff's Claim Does Not Arise From Protected Conduct.**

19 Defendant has the initial burden to make a prima facie showing that plaintiff's complaint  
20 “arises from” defendant's constitutionally-protected free speech or petition activity as defined in  
21 § 425.16(e). (*Equilon Enterprises, LLC, supra* at 61.)  
22

23 Here, the gravamen or thrust of Plaintiff's complaint has absolutely nothing to do with a  
24 person's right of petition or free speech under the United States or California Constitutions. The  
25 gravamen of Plaintiff's complaint is that under the guise of the MSA, instead of simply  
26 contacting Hutnyan and requesting a mutually convenient date and time to come to the home that  
27  
28

1 is the subject of the MSA, Cafferata, along with the co-defendant conspirators, consisting  
2 primarily of L.A. County Sheriff Department personnel who were armed, dressed in tactical  
3 gear, and wearing body cameras, illegally broke into and entered the home under cover of night  
4 at 10:30 p.m. while it was legally occupied by Hutnyan in violation of his civil rights, including  
5 42 U.S.C. § 1983, committed acts warranting a claim for intentional infliction of emotional  
6 distress, and also engaged in the torts of assault and battery upon Hutnyan. This is not protected  
7 activity under the anti-SLAPP statute.  
8

9 Cafferata relies on a recent case, *Baral v. Schnitt* (August 1, 2016) 1 Cal.5<sup>th</sup> 376, 388, in  
10 support of her claim that the anti-SLAPP statute permits the striking of portions of a complaint.  
11 However, Cafferata's reliance on *Baral v. Schnitt* is wholly misplaced. That case concerns  
12 pleadings that include a mix of protected activity with unprotected activity. Here, there is no  
13 protected activity alleged at all. The complaint is predicated solely on the unlawful entry into the  
14 home and the misconduct that occurred there.  
15

16 Cafferata references her communications to the City of Manhattan Beach Police  
17 Department and points to these as "protected activity." However, her communications were not,  
18 as suggested by Cafferata, a "police report" or a report of alleged illegal activity. Her statements  
19 to the police are not the thrust of the complaint, and were false, merely to serve as a cover or ruse  
20 to prevent a proper police response to her wrongful conduct.  
21

22 Section 425.16(e) defines a person's right of petition or free speech to include: "(1) any  
23 written or oral statement or writing made before a legislative, executive, or judicial proceeding,  
24 or any other official proceeding authorized by law, (2) any written or oral statement or writing  
25 made in connection with an issue under consideration or review by a legislative, executive, or  
26 judicial body, or any other official proceeding authorized by law, (3) any written or oral  
27  
28



1 statement or writing made in a place open to the public or in a public forum in connection with  
2 an issue of public interest, or (4) any other conduct in furtherance of the exercise of the  
3 constitutional right of petition or the constitutional right of free speech in connection with a  
4 public issue or an issue of public interest.”

5 The conduct of Cafferata does not fall within this definition. None of her conduct,  
6 including the communications alleged in paragraphs 35-37 of the complaint have anything to do  
7 with a public issue or an issue of public interest. They related solely to her attempts to obtain  
8 “cover” for her illicit activity as described in the complaint.  
9

10 “[C]ourts evaluating a special motion to strike ... must carefully consider whether the  
11 moving party’s conduct falls within the ‘heartland’ of First Amendment activities.” (*Fielder v.*  
12 *Sterling Park Homeowners Ass’n*, 914 F.Supp.2d 1222, 1232 (W.D. Wash 2012).) Here, the  
13 conduct alleged in the complaint describes unprotected activity. The First Amendment does not  
14 protect the outrageous conduct of Cafferata and her co-conspirators as alleged in the complaint  
15 of breaking into the sanctity of the home, under cover of night, with off-duty police officers,  
16 carrying weapons, wearing tactical gear and body cameras, and conspiring with their co-  
17 conspirators/co-defendants to violate plaintiff’s civil rights by engaging in unreasonable search  
18 and seizure and depriving him of his personal liberty and property.  
19  
20

21 Further, speech or petition activity that is “illegal as a matter of law” is not  
22 constitutionally protected and defendant therefore cannot use the anti-SLAPP statute to avoid  
23 liability. (*Flatley v. Mauro*, 39 Cal.4<sup>th</sup> 299, 320 (2006).) Here Cafferata’s conduct is not  
24 protected under the anti-SLAPP statute because her actions and conduct were not constitutionally  
25 protected. (*Ibid.*)  
26

27 ///



**2. Step-Two: Plaintiff Has Demonstrated A Probability of Prevailing.**

Since Cafferata has not met her burden in step-one, i.e., showing that her conduct is protected, the court need not proceed to step-two. (See *E.G. Robles v. Chalilpoyil*, 181 Cal.App.4<sup>th</sup> 566, 582 (2010).) However, if the court is inclined to proceed, plaintiff has demonstrated a probability of prevailing on his claim. To establish a probability of prevailing on the merits, plaintiff must show that the complaint is both legally sufficient and supported by facts sufficient to support a favorable judgment if plaintiff's evidence is credited. (*Navellier v. Sletten*, 29 Cal.4<sup>th</sup> 82, 89, 93 (2002).)

As set forth in the opposition to Cafferata's motion to dismiss under Federal Rules of Civil Procedure § 12(b)(6), plaintiff has adequately pled causes of action for violation of 42 U.S.C. § 1983, for intentional infliction of emotional distress, and assault and battery. Plaintiff incorporates the points and authorities submitted in support of its opposition to Cafferata's motion to dismiss as though fully set forth herein, all of which establish the probability that plaintiff will prevail in this action.

**B. Cafferata's Conduct Is Not Protected By The Litigation Privilege.**

Cafferata argues that her conduct was privileged. Cafferata's simplified averment that she is entitled to immunity under the litigation privilege ignores the facts alleged in the complaint. Typically, the litigation privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212. Contrary to Cafferata's claim, the litigation privilege does not apply in this case because her liability is based on her outrageous conduct of

1 illegally breaking and entering into the home and conspiring with her co-conspirators/co-  
 2 defendants to violate plaintiff's civil rights. There is no basis for her claim of litigation privilege.

3 Additionally, in *Kupiec v. American Int'l. Adjustment Co.* (1991) 235 Cal.App.3d 1326,  
 4 the court confirmed that "section 47, subdivision (b)(2), applies only to communicative acts and  
 5 does not privilege tortious courses of conduct." (*Id.* at 1331.) Moreover, the litigation privilege  
 6 is not a defense to claims for a violation of federal civil rights (*Kimes v. Stone*, 84 F.3d 1121 (9th  
 7 Cir. 1996)).  
 8

#### 9 10 **IV. CONCLUSION.**

11 Plaintiff's claim is not based on an action involving any protected activity. The gravamen  
 12 of plaintiff's action is defendants' wrongful, unlawful and reprehensible breaking and entering  
 13 into the home rightfully occupied by plaintiff. Plaintiff's claims are not based on any action  
 14 involving public participation and petition. Cafferata's allegations are not based solely on her  
 15 communication with law enforcement. The conduct in the complaint describes unprotected  
 16 activity. Therefore, based on the foregoing, defendant Cafferata's special motion to strike should  
 17 be denied.  
 18

19  
20 Dated: June 19, 2017

LARRY M. BAKMAN, ESQ.  
 LAW OFFICES OF GARRY S. MALIN, APC

21  
22 By: /s/ Garry S. Malin  
 23 GARRY S. MALIN  
 24 Attorneys for Plaintiff  
 25  
 26  
 27  
 28